HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1181 Deceptive and Unfair Trade Practices
SPONSOR(S): Ross
TIED BILLS: None **IDEN./SIM. BILLS:** SB 2404

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary		Jaroslav	Havlicak
2) Finance & Tax			
3)			
4)			
5)			

SUMMARY ANALYSIS

Businesses and individuals are currently afforded broad protection from unfair or deceptive acts or practices under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). FDUTPA prohibits such acts in "any trade or commerce," except as its own provisions may specifically exempt. Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority," or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.

Current law provides that certain specified actions or practices of real estate brokers, salesperson or trainees, which already subject such persons to professional discipline under the statute regulating real estate professionals, are exempt from also being subject to FDUTPA. It is unclear whether this exemption specifically applies to provisions in real estate contracts with respect to imposing requirements for resolution of disputes under the contract, such as choice of law, choice of forum, exclusion of specified damages, remedies or defenses, or requiring alternative dispute resolution, such as mediation or arbitration, nor whether this exemption applies to contractual provisions that establish in advance the amount or nature of payments to be made contingent on breach, i.e., liquidated damages. This bill specifically provides that such provisions are exempt from private-party enforcement of FDUTPA, but subject to FDUTPA suits by the state enforcing authorities.

Current law also lists activities and practices by a motor vehicle dealer that constitute unfair or deceptive trade practices under FDUTPA. A court is supposed to consider the amount of actual damages when evaluating an award of attorney's fees for any other of the listed violations, but otherwise current law provides no special procedures for bringing a private-party FDUTPA claim against a motor vehicle dealer for such practices. This bill requires a potential private plaintiff to serve a motor vehicle dealer with a written demand at least 30 days before filing a suit alleging a listed FDUTPA violation, and specifies that compliance with the demand serves as a release from further FDUTPA liability arising from the same transaction but is not an admission of wrongdoing. This bill further allows the dealer to file a consent to the relief sought any time up to 60 days before trial, in which case the court is to conduct a summary proceeding solely for the determination of damages and/or equitable remedies, as appropriate. If the dealer complies with the demand or submits to the consent proceeding, the plaintiff is not entitled to reasonable attorney's fees and costs if the initial demand was made in bad faith or the actual damages are less than 75% of the damages initially demanded.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[]	N/A[x]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[x]	No[]	N/A[]
4. Increase personal responsibility?	Yes[]	No[x]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

This bill could be described as decreasing personal responsibility because it exempts certain activities from being subject to private enforcement of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), and makes bringing private FDUTPA enforcement actions based on other specified activities more difficult.

B. EFFECT OF PROPOSED CHANGES:

General Background on the Florida Deceptive and Unfair Trade Practices Act

Florida has numerous laws on the books to protect consumers. One of the most significant of these is part II of ch. 501, F.S., known as the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").[1] Among the reasons for enacting FDUTPA was a perceived need "[t]o protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."[2]

Businesses and individuals are afforded broad protection from unfair or deceptive acts or practices under FDUTPA. It prohibits such acts in "any trade or commerce,"[3] except as its own provisions may specifically exempt.[4] FDUTPA states a broad proscription, which applies through civil enforcement across industries and business conduct generally in any medium. The definition of "trade or commerce" in s. 501.203, F.S., on its face encompasses all advertising, soliciting, providing, offering, or distributing without limitation as to medium or subject matter.

Claims under FDUTPA can generally be brought either by the state through a state attorney or the Attorney General acting as "the enforcing authority,"[5] or by a private party who has allegedly suffered actual losses resulting from a FDUTPA violation.[6]

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[1] Sections 501.201-501.213, F.S.
[2] Section 501.202(2), F.S.
[3] Section 501.204(1), F.S.
[4] FDUTPA expressly exempts from its provisions: retailers acting in good faith without actual knowledge of a violation, *see* s. 501.211(2), F.S.; acts or practices "required or specifically permitted by federal or state law", s. 501.212(1), F.S.; publication, broadcasting, printing or other dissemination of information on behalf of others without actual knowledge of a violation, *see* s. 501.212(2), F.S.; claims for personal injury, wrongful death, or damage to property other than property that is the basis of the violation, *see* s. 501.212(3), F.S.; claims against persons regulated by, or on the basis of activities regulated by, the Department of Financial Services, the Office of Financial Regulation of the Financial Services Commission, or banks or savings and loan associations regulated by those entities or by federal agencies, *see* s. 501.212(4), F.S.; activities regulated by the Florida Public Service Commission; or activities "involving the sale, lease, rental, or appraisal of real estate by a person licensed, certified, or registered pursuant to chapter 475 [regulation of realtors and real estate appraisers], which act or practice violates s. 475.42 [realtors' professional ethics] or 475.626 [appraisers' professional ethics]." Section 501.212(6), F.S.
[5] Section 501.203(2), F.S. The state attorney is the default enforcing authority for FDUTPA violations within any particular judicial circuit. The Department of Legal Affairs ("DLA"), headed by the Attorney General, is the enforcing authority for

Section 1: Dispute Resolution/Liquidated Damages Clauses In Real Estate Transactions

Section 501.212(6), F.S., currently exempts from the provisions of FDUTPA acts or practices by real estate brokers or salespersons that already violate the "Violations and penalties" section of their professional statute, s. 475.42, F.S. Paragraph (1)(f) of that section in turn prohibits violations of s. 475.25(1)(b), (c), (d) or (h), F.S., provisions of the professional discipline section of that same chapter, thus incorporating violations of those paragraphs into what is exempt from FDUTPA.

Section 475(1)(b), F.S., is certainly the broadest of the real estate exemptions from FDUTPA; in pertinent part, it provides that it is a basis for the denial or revocation of licensure, permitting or registration, for reprimand and for administrative penalties of up $1000 per violation if a licensee, registrant, permittee or applicant:

> [h]as been guilty of fraud, misrepresentation, concealment, false promises, false pretenses, dishonest dealing by trick, scheme, or device, culpable negligence, or breach of trust in any business transaction in this state or any other state, nation, or territory; has violated a duty imposed upon her or him by law or by the terms of a listing contract, written, oral, express, or implied, in a real estate transaction; has aided, assisted, or conspired with any other person engaged in any such misconduct and in furtherance thereof; or has formed an intent, design, or scheme to engage in any such misconduct and committed an overt act in furtherance of such intent, design, or scheme.

Despite the breadth of this language, it is not entirely clear whether it covers contractual provisions with respect to imposing requirements for resolution of disputes under the contract, such as choice of law, choice of forum, exclusion of specified damages, remedies or defenses, or requiring alternative dispute resolution, such as mediation or arbitration, nor whether this language applies to contractual provisions that establish in advance the amount or nature of payments to be made contingent on breach, i.e., liquidated damages. Thus, it is possible that such contractual terms made by a real estate broker or salesperson would not be covered by the exemption from FDUTPA provided in s. 501.212(6), F.S.

Proposed Changes

This bill provides that provisions of real estate contracts addressing alternative dispute resolution or liquidated damages may not form the basis of a private-party FDUTPA enforcement action. Under this bill, this would be true even if none of the parties involved was a licensed real estate professional. However, this bill also expressly provides that the enforcing authority may bring FDUTPA with respect to transactions involving such language.

Section 2: Definitions With Respect to Motor Vehicle Sales

Section 501.975, F.S., defines "customer," "dealer," "replacement item," "threshold amount," and "vehicle," for purposes of FDUTPA claims against motor vehicle dealers for violations of s. 501.976, F.S., described below under Section 3.

Proposed Changes

Section 2 of this bill provides that these definitions also apply to the new s. 501.977, F.S., created by Section 3 of this bill as described below.

FDUTPA violations occurring in or affecting more than one judicial circuit, and for single-circuit violations where the state attorney either defers to DLA in writing, or fails to act on the violation with 90 days of receiving a written complaint.

[6] *See* s. 501.211, F.S.

Section 3: Claims Against Motor Vehicle Dealers

Part VI of ch. 501, F.S., currently consisting of only ss. 501.975 and 501.976, F.S., applies FDUTPA specifically to motor vehicle dealers, whom s. 501.975(2), F.S., defines as being "motor vehicle dealers" as defined in s. 320.27, F.S., which provides, in pertinent part, that the term applies to:

> any person in engaged in the business of buying, selling, or dealing in motor vehicles or offering or displaying motor vehicles for sale at wholesale or retail, or who may service and repair motor vehicles pursuant to an agreement as defined in s. 320.60(1). Any person who buys, sells, or deals in three or more motor vehicles in any 12-month period or who offers or displays for sale in any 12-month period shall be prima facie presumed to be engaged in such business. The terms "selling" and "sale" include lease-purchase transactions.[7]

Section 320.27(1)(b), F.S., defines a "motor vehicle" as:

> any motor vehicle of the type and kind required to be registered under chapter 319 and [chapter 320], except a recreational vehicle, moped, motorcycle powered by a motor with a displacement of 50 cubic centimeters or less, or mobile home.

Section 501.976, F.S., lists activities and practices by a motor vehicle dealer that constitute unfair or deceptive trade practices under FDUTPA. This section specifies that it is such a practice for a dealer to:

> (1) Represent directly or indirectly that a motor vehicle is a factory executive vehicle or executive vehicle unless such vehicle was purchased directly from the manufacturer or a subsidiary of the manufacturer and the vehicle was used exclusively by the manufacturer, its subsidiary, or a dealer for the commercial or personal use of the manufacturer's, subsidiary's, or dealer's employees.
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> (2) Represent directly or indirectly that a vehicle is a demonstrator unless the vehicle complies with the definition of a demonstrator in s. 320.60(3).
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> (3) Represent the previous usage or status of a vehicle to be something that it was not, or make usage or status representations unless the dealer has correct information regarding the history of the vehicle to support the representations.
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> (4) Represent the quality of care, regularity of servicing, or general condition of a vehicle unless known by the dealer to be true and supportable by material fact.
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> (5) Represent orally or in writing that a particular vehicle has not sustained structural or substantial skin damage unless the statement is made in good faith and the vehicle has been inspected by the dealer or his or her agent to determine whether the vehicle has incurred such damage.
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> (6) Sell a vehicle without fully and conspicuously disclosing in writing at or before the consummation of sale any warranty or guarantee terms, obligations, or conditions that the dealer or manufacturer has given to the buyer. If the warranty obligations are to be shared by the dealer and the buyer, the method of determining the percentage of repair costs to be assumed by each party must be disclosed. If the dealer intends to disclaim or limit any expressed or implied warranty, the disclaimer must be in writing in a conspicuous manner and in lay terms in accordance with chapter 672 [Article 2 of the Uniform Commercial Code, relating to sales of goods, as adopted in Florida] and the Magnuson-Moss Warranty-- Federal Trade Commission Improvement Act.
>
> (7) Provide an express or implied warranty and fail to honor such warranty unless properly disclaimed pursuant to subsection (6).
>
> (8) Misrepresent warranty coverage, application period, or any warranty transfer cost or conditions to a customer.

[7] Section 320.27(1)(c), F.S.

(9) Obtain signatures from a customer on contracts that are not fully completed at the time the customer signs or which do not reflect accurately the negotiations and agreement between the customer and the dealer.

(10) Require or accept a deposit from a prospective customer prior to entering into a binding contract for the purchase and sale of a vehicle unless the customer is given a written receipt that states how long the dealer will hold the vehicle from other sale and the amount of the deposit, and clearly and conspicuously states whether and upon what conditions the deposit is refundable or nonrefundable.

(11) Add to the cash price of a vehicle as defined in s. 520.02(2) any fee or charge other than those provided in that section and in rule 3D-50.001, Florida Administrative Code. All fees or charges permitted to be added to the cash price by rule 3D-50.001, Florida Administrative Code, must be fully disclosed to customers in all binding contracts concerning the vehicle's selling price.

(12) Alter or change the odometer mileage of a vehicle.

(13) Sell a vehicle without disclosing to the customer the actual year and model of the vehicle.

(14) File a lien against a new vehicle purchased with a check unless the dealer fully discloses to the purchaser that a lien will be filed if purchase is made by check and fully discloses to the buyer the procedures and cost to the buyer for gaining title to the vehicle after the lien is filed.

(15) Increase the price of the vehicle after having accepted an order of purchase or a contract from a buyer, notwithstanding subsequent receipt of an official price change notification. The price of a vehicle may be increased after a dealer accepts an order of purchase or a contract from a buyer if:

(a) A trade-in vehicle is reappraised because it subsequently is damaged, or parts or accessories are removed;

(b) The price increase is caused by the addition of new equipment, as required by state or federal law;

(c) The price increase is caused by the revaluation of the United States dollar by the Federal Government, in the case of a foreign-made vehicle;

(d) The price increase is caused by state or federal tax rate changes; or

(e) Price protection is not provided by the manufacturer, importer, or distributor.

(16) Advertise the price of a vehicle unless the vehicle is identified by year, make, model, and a commonly accepted trade, brand, or style name. The advertised price must include all fees or charges that the customer must pay, including freight or destination charge, dealer preparation charge, and charges for undercoating or rustproofing. State and local taxes, tags, registration fees, and title fees, unless otherwise required by local law or standard, need not be disclosed in the advertisement. When two or more dealers advertise jointly, with or without participation of the franchisor, the advertised price need not include fees and charges that are variable among the individual dealers cooperating in the advertisement, but the nature of all charges that are not included in the advertised price must be disclosed in the advertisement.

(17) Charge a customer for any predelivery service required by the manufacturer, distributor, or importer for which the dealer is reimbursed by the manufacturer, distributor, or importer.

(18) Charge a customer for any predelivery service without having printed on all documents that include a line item for predelivery service the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale."

(19) Fail to disclose damage to a new motor vehicle, as defined in s. 319.001(8), of which the dealer had actual knowledge, if the dealer's actual cost of repairs exceeds the threshold amount, excluding replacement items.

Section 501.976, F.S., further provides that a court should consider the amount of actual damages when evaluating an award of attorney’s fees for any other of the listed violations, but otherwise

provides no special procedures for bringing a private-party FDUTPA claim against a motor vehicle dealer for such practices.

Proposed Changes

This bill creates a new s. 501.977, F.S. This new section establishes steps that a private party must follow before filing suit against a motor vehicle dealer for any of the FDUTPA violations specified in s. 501.976, F.S. These requirements do not apply to the enforcing authority, i.e., the state attorneys or the Attorney General.

Under this bill, at least 30 days before a private plaintiff may sue a motor vehicle dealer for a FDUTPA violation listed in s. 501.976, F.S., the plaintiff must serve a good-faith written demand upon the dealer, by certified mail, indicating that the demand is made pursuant to the new s. 501.977, F.S., specifically describing the alleged violation, specifically stating the actual damages sought and/or practices to be enjoined, and affording the dealer 30 days to pay such damages and/or desist from such practices. Within the 30-day period, the dealer's payment of demanded damages or agreement to cease and desist from specified practices as demanded shall not serve as an admission of wrongdoing. Payment of demanded damages shall also serve as a release from FDUTPA liability for any violation of s. 501.976, F.S., arising out of the same transaction described in the demand. Agreement to cease and desist must be served on the plaintiff within the 30-day period, and be forwarded to the Attorney General with a copy of the demand, to be enforced by the enforcing authority as if originally ordered by the enforcing authority.

If the dealer rejects the demand, the plaintiff is not authorized to recover reasonable attorney's fees and costs if the initial demand was made in bad faith or if judgment from a suit based on the transaction described in the demand is less than 75% of the damages demanded.

Additionally, any time after suit is filed by a private plaintiff, but no later than 60 days before trial, the dealer may file a consent to any or all of the relief sought. The dealer may consent to the lowest amount of damages claimed by the plaintiff in the demand or in any interrogatory or deposition; if damages remain disputed, the dealer may request a summary procedure for the determination of damages only, wherein the court may establish what limited discovery, if any, is to be taken, recognizing the limited purpose of the proceeding. With respect to injunctive relief, the dealer may request a summary procedure for the determination of an appropriate equitable remedy.

Within 30 days of the court's order pursuant to a summary procedure enforcing the consent, the dealer's payment of the actual damages determined shall not serve as an admission of wrongdoing and shall serve as a release from FDUTPA liability for any violation of s. 501.976, F.S., arising out of the same transaction described in the initial demand. If the dealer does not pay within 30 days, the court is required to enter judgment against the dealer, which then will be treated as an admission of wrongdoing and specifically a violation of s. 501.976, F.S.

If a consent is filed, the plaintiff is to be entitled to reasonable attorney's fees and costs from the dealer, unless the initial demand was made in bad faith or the actual damages determined under the summary consent proceeding is less than 75% of the damages demanded.

C. SECTION DIRECTORY:

Section 1. Amends s. 501.212, F.S., to provide for exemption of real estate contracts involving dispute resolution or liquidated damages from the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA").

Section 2. Amends s. 501.975, F.S., to add a cross-reference.

Section 3. Creates s. 501.977, F.S., to provide for presuit requirements and a pretrial consent procedure with respect to FDUTPA suits on specified grounds against motor vehicle dealers.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   It is possible that by encouraging more state rather than private enforcement of FDUTPA, this bill would increase state revenue derived from civil penalties. The fiscal impact, if any, is unknown.

2. Expenditures:

   It is possible that by making private FDUTPA actions against realtors and motor vehicle dealers more difficult, this bill would impose a greater burden on state attorneys or the Attorney General to pursue violations. The fiscal impact, if any, is unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   For the same reasons as with state attorneys and the Attorney General above, it is possible that this bill could impose additional investigatory costs on local law enforcement. The fiscal impact, if any, is unknown.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It is possible that this bill would alleviate some potential litigation costs to realtors and motor vehicle dealers, and thus reduce their costs of liability insurance.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, does not appear to reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not appear to reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Right to Civil Jury Trial

Article I, section 22 of the Florida Constitution provides, in pertinent part: "The right of trial by jury shall be secure to all and remain inviolate."[8] Because this bill allows a motor vehicle dealer to file a consent and thereby unilaterally receive a summary judicial determination of damages, without any role for a jury and without any ultimate finding of wrongdoing, it may raise concerns under this provision.

The Florida Supreme Court has stated that this provision guarantees the right to jury trial in all actions "in which the right was enjoyed at the time this state's first constitution became effective in 1845."[9] However, it must be construed broadly, in the understanding that "[i]t is the nature of the controversy between the parties, and its fitness to be tried by a jury . . . that must decide the question."[10] It is not formalistically tied to exactly those specific proceedings that could be brought in 1845, "but should be extended to like proceedings as they arise."[11] Moreover, questions regarding the right to jury trial should be resolved in favor of jury trial.[12]

A court could hold that complex consumer statutes like FDUTPA are a truly new innovation unknown to the common law, and thus entirely subject to legislative control as to the methods of their enforcement. Such a view would allow for this bill's summary consent procedure. However, a court could also hold that, because an action for money damages has traditionally been one at law, thus allowing for jury trial,[13] the portion of this bill allowing for the summary consent procedure, at least with respect to damages rather than simply equitable relief, is unconstitutional, and strike it down as such.

Separation of Powers: Substance vs. Procedure

Article V, section 2(a) of the Florida Constitution provides that the "Supreme Court shall adopt rules for the practice and procedure in all courts." This bill's requirements that plaintiffs send demand letters to dealers before filing suit, and that courts conduct summary consent proceedings, may raise concerns under this provision.

Florida courts protect their rulemaking power by striking down laws that conflict with their rules. For example, in 1976, the Florida Supreme Court ruled unconstitutional a statute regarding the state mental hospital because it was in conflict with a previously passed criminal rule of procedure regarding persons found not guilty by reason of insanity.[14] In 1991, the court ruled that a statute requiring mandatory severance of a mortgage foreclosure trial from a trial on any other counterclaims was unconstitutional because it conflicted with an existing rule of civil procedure.[15]

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[8] Unlike most of the Bill of Rights, the Supreme Court of the United States has expressly held that the roughly analogous provision of the federal constitution, the Seventh Amendment, does not apply to the states through incorporation in the Due Process Clause of the Fourteenth Amendment. *See, e.g.*, *Minneapolis and St. Louis Rwy. Co. v. Bombolis*, 241 U.S. 211 (1916); *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90 (1876).

[9] *In re Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433, 434 (Fla. 1986). *See also Dudley v. Harrison, McCready & Co.*, 173 So. 820 (1937).

[10] *Id.* at 435.

[11] *Printing House, Inc. v. Department of Revenue*, 614 So.2d 1119, 1123 (Fla. 1st DCA 1992) (citing *Wiggins v. Williams*, 18 So. 859 (Fla. 1896)).

[12] *See 381651 Alberta, Ltd. v. 279298 Alberta, Ltd.*, 675 So.2d 1385 (Fla. 4th DCA 1996).

[13] *See id.*

[14] *See In re Connors*, 332 So.2d 336 (Fla. 1976).

[15] *See Haven Federal Savings & Loan Assn. v. Kirian*, 579 So.2d 730 (Fla. 1991).

Essentially, the rule is that substance is legislative and procedure is judicial. In practice, determining the difference is not simple or clear. In 1973, Justice Adkins described the difference between substance and procedure in this way:

> The entire area of substance and procedure may be described as a "twilight zone" and a statute or rule will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made. From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure." Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof. Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the Court throughout the progress of the case from the time of its initiation until final judgment and its execution.[16]

This "twilight zone" remains to this day, and causes in the analysis of many enactments a difficult determination of whether a matter is procedural or substantive. It is possible that a court could regard this bill's presuit requirements or summary consent proceedings as procedural and strike them down on that basis.

However, even if a court held that the prohibition is procedural, that court also still might not strike it down. Despite treating it as procedural, the Florida Supreme Court in *Kalway v. Singletary*[17] nonetheless upheld a thirty-day statute of limitations for the filing of an action challenging a prisoner disciplinary proceeding. In discussing the separation of powers issue, the Court said:

> As a practical matter, the Court on occasion has deferred to the expertise of the legislature in implementing its rules of procedure. *See, e.g.*, *Amendment to Florida Rule of Juvenile Procedure 8.100(a)*, 667 So.2d 195, 195 (Fla.1996) (noting that the need for juvenile detention shall be made "according to the criteria provided by law" and explaining that these "include those requirements set out in section 39.042, Florida Statutes (1995)"); *In re Family Law Rules of Procedure*, 663 So.2d 1049, 1086 (Fla.1995) (setting forth amended rule 12.740, which provides that all contested family matters may be referred to mediation, "[e]xcept as provided by law"). The setting of an interim time frame for challenging the Department's disciplinary action following the exhaustion of intra-departmental proceedings is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts.[18]

Thus, even if a court were to treat this bill's provisions as procedural, it could certainly still defer to the Legislature's primary role in establishing consumer protection laws and the means for enforcing them.

Access to Courts

Article I, section 21 of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Because this bill eliminates the currently at least arguable ability of private parties to bring FDUTPA suits against

[16] *In re Florida Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla. 1973).
[17] 708 So.2d 267 (Fla. 1998).
[18] *Id.* at 269.

real estate professionals with respect to contracts requiring alternative dispute resolution or liquidated damages, it may raise concerns under this provision.

In *Kluger v. White*,[19] the Florida Supreme Court considered the Legislature's power to abolish causes of action. At issue in *Kluger* was a statute which abolished causes of action to recover for property damage caused by an automobile accident unless the damage exceeded $550.[20] The court determined that the statute violated the access to courts provision of the state constitution, holding that where a right to access the courts for redress for a particular injury predates the adoption of the access to courts provision in the 1968 state constitution, the Legislature cannot abolish the right without providing a reasonable alternative unless the Legislature can show (1) an overpowering public necessity to abolish the right and (2) no alternative method of meeting such public necessity.[21] Because the right to recover for property damage caused by auto accidents predated the 1968 adoption of the declaration of rights, the court held that the restriction on that cause of action violated the access to courts provision of the state constitution.

The court applied the *Kluger* test in *Smith v. Department of Insurance*.[22] In 1986, the Legislature passed comprehensive tort reform legislation that included a cap of $450,000 on noneconomic damages.[23] The cap on damages was challenged on the basis that it violated the access to courts provision of the state constitution. The Florida Supreme Court found that a right to sue for unlimited noneconomic damages existed at the time the constitution was adopted.[24] The *Smith* court held that the Legislature had not provided an alternative remedy or commensurate benefit in exchange for limited the right to recover damages and noted that the parties did not assert that an overwhelming public necessity existed.[25] Accordingly, the court held that the $450,000 cap on noneconomic damages violated the access to courts provision of the Florida Constitution.

Because this bill may eliminate causes of action, a litigant could argue that it likewise denies him or her access to the courts. A court confronted with the issue would first have to determine whether such a cause of action could nonetheless have been pursued under Florida law before the adoption of the access to courts provision in 1968. Should a court find no, which it certainly could as FDUTPA dates from 1973,[26] the judicial inquiry would end at that point, and this bill's provisions would be allowed to stand. But it is also possible that a court could hold that pre-1968 Florida law would have allowed such suits under the common-law cause of action for fraud, in which case this bill would have to withstand the *Kluger* test. Especially given its lack of legislative findings, it is possible that it would not be able to do so.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 2 of this bill establishes a new cross-reference for the definitions in s. 501.975, F.S., but this statutory section would still have to be amended again if any additional section was added to Part VI of ch. 501, F.S., beyond the one in this bill. A reference to simply "this Part" instead of adding the number of the new section might provide greater convenience in the event the Legislature should ever add further sections.

[19] 281 So. 2d 1 (Fla. 1973).
[20] *See* ch. 71-252, s. 9, L.O.F.
[21] *See Kluger* at 4.
[22] 507 So. 2d 1080 (Fla. 1987).
[23] *See* ch. 86-160, s. 59, L.O.F.
[24] *See Smith* at 1087.
[25] *See id.* at 1089.
[26] *See* ch. 73-124, s. 1, L.O.F.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

N/A